

A Antara Elektrik Sdn Bhd v Bell & Order Bhd

HIGH COURT (KUALA LUMPUR) — GUAMAN CIVIL NO S6-22-666 OF
2000
AZMEL J
4 APRIL 2002

B

***Contract** — Building contract — Claim for work done — Term that sub-contractor would be paid in accordance with the PAM form of payment — Whether sub-contractor may be paid according to a different form of payment*

C

***Contract** — Variation — Written agreement — Whether variation of a written agreement to be in writing — Whether a written agreement may be varied orally*

D

The plaintiff was appointed subcontractor by the defendant to carry out certain works for a construction project. The defendant was appointed by the main contractor — Concrete Construction Group (Malaysia) Sdn Bhd ('CCG'). The plaintiff's claim against the defendant was in respect of the balance due for work done. The contract between the plaintiff and defendant was based on a letter dated 19 July 1995. Clause 5.2 of the said letter clearly stipulated that the terms of payment would be in accordance with the PAM form of payment ('PAM form'). The only issue before the High Court was whether the plaintiff should be paid according to the PAM form or the CCG Special Conditions for Subcontractors form ('the CCG form'). Payment according to the PAM form entitled the plaintiff to be paid within 14 days of the receipt by the contractor of the architect's certificate. However, payment according to the CCG form meant that the plaintiff would only be paid after the defendant had been paid by CCG. The defendant argued that the plaintiff had verbally agreed to adopt the CCG form.

E**F**

Held, allowing the plaintiff's claim with costs:

G

(1) The terms of payment should be in accordance with the PAM form of payment. There was a written agreement between the plaintiff and the defendant as regards the terms of payment for works carried out by the plaintiff and it was in accordance with the PAM form of payment. The parties were bound by what they had agreed to and neither party could go against what they had earlier agreed to unless it was mutually varied (see pp 323I-324A).

H

(2) A variation of a written agreement must be made in writing. On the facts, no written variation had been produced in court. No amount of oral agreements may vary a written agreement. Thus, for the defendant to vary cl 5.2 of the letter dated 19 July 1995 issued by itself, a new written agreement signed and agreed by the plaintiff had to be executed. Clause 5.2 was a specific provision and it would prevail over other general provisions (see p 324A, C-E); *Ryoden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33 followed.

I

[Bahasa Malaysia summary]

Plaintif telah dilantik sebagai subkontraktor oleh defendan untuk menjalankan kerja suatu projek pembinaan. Defendan telah dilantik bekerja oleh kontraktor utama — Concrete Construction Group (Malaysia) Sdn Bhd ('CCG'). Tuntutan plaintif terhadap defendan adalah mengenai baki bayaran untuk kerja-kerja yang telah dijalankan. Perjanjian di antara plaintif dan defendan berdasarkan surat yang bertarikh 19 Julai 1995. Klausula 5.2 surat tersebut jelas menyatakan terma-terma bayaran akan mengikut cara bayaran PAM ('cara PAM'). Isu di hadapan mahkamah adalah sama ada plaintif patut dibayar menurut cara PAM atau 'CCG Special Conditions for Subcontractors' ('cara CCG'). Bayaran menurut cara PAM menyebabkan plaintif berhak untuk dibayar dalam masa 14 hari daripada tarikh penerimaan sijil arkitek oleh kontraktor. Akan tetapi bayaran menurut cara CCG bermakna plaintif hanya akan dibayar setelah defendan mendapat bayaran daripada CCG. Defendan telah menyatakan bahawa plaintif telah bersetuju secara lisan untuk menggunakan cara CCG.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

- (1) Terma-terma bayaran patut mengikut cara bayaran PAM. Terdapat perjanjian bertulis di antara plaintif dan defendan mengenai terma-terma bayaran untuk kerja-kerja yang dijalankan oleh plaintif dan ini mengikut cara bayaran PAM. Parti-parti terikat oleh apa yang telah dipersetujui dan tidak boleh memungkirinya apa yang telah dipersetujui terdahulu, kecuali perjanjian tersebut saling diubah (lihat ms 323I–324A).
- (2) Perubahan perjanjian bertulis mesti dibuat bertulis. Menurut fakta-fakta, tiada perubahan bertulis yang telah dikemukakan di mahkamah. Perjanjian lisan tidak boleh mengubah perjanjian bertulis. Oleh itu, untuk defendan mengubah kl 5.2 surat tersebut yang bertarikh 19 Julai 1995 yang dikeluarkan sendiri, perjanjian bertulis yang baru dan yang dipersetujui oleh plaintif perlu dilaksanakan. Klausula 5.2 merupakan peruntukan khusus dan akan mengatasi peruntukan am (lihat ms 324A, C–E); *Ryoden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33 diikuti.

Notes

For cases on claims for work done under a building contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2123–2127.

For cases on variation of contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 4119–4130.

Cases referred to

Ryoden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd [1992] 1 MLJ 33 (folld)

- A** *SS Tieh (Paul Ong & Assoc)* for the plaintiff.
K Goik (Nasir Kenzin & Tan) for the defendant.

B **Azmel J:** The plaintiff's claim against the defendant was for payment for work done amounting to RM1,260,779.71. The plaintiff was appointed by the defendant as the subcontractor to carry out works for Electrical LV and Telephone Services for the project known as 'Proposed 21 storey office building with car park floors on Lot 162, Section 57, Jalan Ramlee, Kuala Lumpur (Wisma Perkasa)'. The total works cost RM6,350,984.23. A sum of RM5,090,204.52 had been paid by the defendant. The amount outstanding, which is the subject matter of this claim, was RM1,260,779.71. There was no dispute as to the quantum of the plaintiff's claim.

The defendant was appointed by the main contractor, Concrete Construction Group (Malaysia) Sdn Bhd ('CCG'). The owner of the said project is Wisma Perkasa Sdn Bhd.

D The only issue that needed to be determined was the terms in which the plaintiff's claim was to be paid by the defendant, ie whether it should be in accordance with the 'PAM form of payment' or with 'the CCG Special Conditions for Subcontractor' which means that payment by the defendant to the plaintiff would only be made after the defendant had received payment from CCG. Both counsel agreed that this was the only issue for the determination of the court. Following that, both counsel had also agreed not to call any witnesses but only to furnish their written submissions on this issue.

F After having considered submissions by both counsel, as well as other relevant documents filed in court, I decided in favour of the plaintiff in that the terms of payment should be in accordance with the PAM form of payment. This decision was based on the following reasons.

To begin with, the relationship between the plaintiff and the defendant is contractual. The contract is based on a letter issued by the defendant to the plaintiff dated 19 July 1995 containing all the terms of the appointment. Clause 5.2 of the letter states:

G *Terms of payment shall be in accordance with the PAM form of payment. Payment value is dependent on your satisfaction of the consultants that all aspects of your progress claims are in accordance with the conditions of contract. (Emphasis added).*

H The PAM form of payment is clearly stated under sub-cl (b) of cl 11 of PAM's subcontract. It reads:

Within fourteen days of the receipt by the contractor of any certificate or duplicate copy thereof from the Architect, the contractor shall notify and pay to the subcontractor the total value certified therein in respect of the subcontract works and in respect of any authorized variations thereof ...

I From the above, I was of the view that there was a written agreement between the defendant and the plaintiff as regards the terms of the payment of the works carried out by the plaintiff. It was in accordance with the PAM

form of payment. Under the terms of the PAM subcontract (cl 11(b)), payment should be made within 14 days of the receipt by the contractor of the architect's certificate. As such, parties are bound by what they have agreed and neither party can go against what they had earlier agreed unless it was mutually varied. A variation of a written agreement must be made in writing. No such written variation had ever been produced in court. Therefore, it can be concluded that there were no such variation of the terms of payment. The status of the plaintiff as nominated subcontractor would not make any difference in the relationship between the plaintiff and the defendant. As a matter of fact, the PAM subcontract (encl 9) does mention that the subcontractor be a nominated subcontractor.

It was argued by the defendant that the plaintiff had verbally agreed to adopt the CCG Special Conditions for Subcontractors. As I have said earlier, a written agreement can only be varied by another written agreement. No amount of oral agreements can have the effect of varying a written agreement. Therefore, in order for the defendant to vary the terms of cl 5.2 of the letter of offer dated 19 July 1995, which was made and issued by the defendant itself, a new written agreement signed and agreed by the plaintiff must be executed. Otherwise, the terms of cl 5.2 would continue to be valid and enforceable.

It is true that the letter of 19 July 1995 did mention the CCG Special Conditions for Subcontractors. At the very best, the plaintiff was given knowledge and understanding of the provision. However, with the specific provision of cl 5.2 of the letter, the terms of payment in respect of the plaintiff's claims for work would still prevail over any other terms that may have been contained in the CCG Special Conditions for Subcontractors. Otherwise the purpose of including cl 5.2 would be superfluous and meaningless. Since cl 5.2 is a specific provision, it would prevail over other general provisions. The case in point on this issue is *Ryoden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33, in which the plaintiff subcontractor claimed from the defendant main contractor progress payments for work done. In its defence, the defendant relied on cl 27(a)(vii) of the main contract which, in essence, stated that payment to the subcontractor would be 14 days after the defendant had received payment from the employer. In respect of that defence, the court held, at p 34 (holding (1)), dismissing the defendant's appeal:

The provisions of cl 27(a)(vii) were not expressly stated in the two subcontracts. No privity of contract exists between the employer and the defendant and reading the sub-contract as a whole, it cannot be said that cl 27(a)(vii) of the main contract had been incorporated into and formed part of the subcontract. On the contrary, cl 2 of the subcontract only required the plaintiff to observe and to conform with all the provisions of the main contract so far as they were related and applicable to the subcontract works and were not repugnant to or inconsistent with the express provisions of the subcontract. To incorporate cl 27(a)(vii) of the main contract into the subcontract would be repugnant to or inconsistent with the express provisions of cl 11(b) of the subcontract which clearly required the main contractor to inform and pay the subcontractor within 14 days upon receipt of the payment certificate issued by the architect.

- A** The circumstances of the above mentioned case are quite similar to the instant case and the issue raised is exactly the same. I am in full agreement with the decision of YA Dato' Lim Beng Choon.

For the reasons that I have stated above, I allowed the plaintiff's claim against defendant with costs.

- B** *Plaintiff's claim allowed with costs.*

Reported by Andrew Christopher Simon

C

D

E

F

G

H

I